MAJLIS PEGUAM

v.

POH FOOK YUEN & ANOR

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
JEFFREY TAN JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02(IM)-186-2010]
2 MARCH 2012

LEGAL PROFESSION: *Malaysian Bar - Locus standi - Complaint against advocate and solicitor to Disciplinary Board ('DB') - Order by court restraining DB from further hearing and investigating complaint - Whether Majlis Peguam should be allowed to intervene - Whether Majlis Peguam "party aggrieved" when DB prevented from carrying out duties - Legal Profession Act 1976, ss. 42 & 47*

The defendants complained in respect of the first plaintiff/respondent's actions as an advocate and solicitor, practising at Tetuan Poh Mahadzir & Company (second respondent), to the Disciplinary Board ('DB'). Acting upon the complaint the DB appointed a Disciplinary Committee ('DC') to hear and investigate the complaint. Subsequently, the plaintiffs/respondents ('respondents') filed an application for judgment in default of appearance against the defendants. The respondents obtained the Orders and served the draft Orders on the DC. The respondents relied on the Orders to, *inter alia*, restrain the DC from hearing and investigating the complaint on the grounds that the DC would be in breach of the Orders. The DC therefore decided not to proceed with the hearing and investigation of the complaint. The appellant ('Majlis Peguam') filed its applications by summons in chambers to intervene and to vary the Orders. Its applications were dismissed by the High Court on the grounds that Majlis Peguam had failed to show how its legal and statutory rights have been affected. The learned judge held that it should be the DB and not Majlis Peguam who should make the applications. The judge also held that the fact that the defendants had not taken any steps to set aside the Orders showed that they had been lackadaisical in their defence and therefore begged the question

whether they were really serious in pursuing their complaint. At the hearing of the appeal, the respondents submitted that the defendants' application to set aside the judgment in the High Court had been dismissed and hence the doctrine of *res judicata* applied. It was the respondents' contention that the DC remained restrained from proceeding as there was nothing to intervene.

Held (allowing the appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Except for the purposes of the Legal Profession Qualifying Board, the only body that may undertake and defend legal action for and against the Malaysian Bar is the Malaysian Bar, represented by Majlis Peguam pursuant to ss. 42 and 47 of the Legal Profession Act 1976. The terms Malaysian Bar and Majlis Peguam were used interchangeably. Majlis Peguam or the Malaysian Bar is no less a "party aggrieved" when the DB of the Malaysian Bar is prevented from carrying out its responsibilities than a party who is denied a right he is entitled to. The learned judge fell into error when he allowed form to prevail over substance without first addressing the question whether the form affected the substance. (para 10)

(2) From the writ of summons and the summons in chambers, the apparent focus of concern appeared to be the letter of complaint by the defendants. It became evident that the investigation by the DC was the focus of concern when the drafts of the Orders were served on the DC. It was clear that the injunction was to prevent the DB from acting upon and the DC from investigating the complaint. Majlis Peguam ought therefore to have been made a party. This was more so when the only party appearing before the learned judge were the respondents themselves. (paras 12-13)

(3) The defendants' lackadaisical attitude in the court proceedings or choosing not to defend their legal rights in the court may warrant consideration by the DB but they were irrelevant to the consideration of the application before the learned judge to amend the Orders to enable the DB and the DC to carry out their statutory responsibilities to investigate and if warranted, to act upon a complaint by the defendants. (para 13)

(4) The respondents' argument that there was nothing to intervene was misleading. There was reason to intervene and to seek variation of the Orders at the time the application was filed before the High Court, to enable Majlis Peguam to carry out its statutory obligation to investigate a complaint by a client of a legal firm for improper conduct. (paras 14 & 15)

Bahasa Malaysia *Translation Of Headnotes*

Defendan-defendan membuat aduan berkaitan dengan tindakan plaintif/responden pertama sebagai peguamcara dan peguambela, yang beramal di Tetuah Poh Mahadzir & Company (responden kedua), kepada Lembaga Tatatertib ('LT'). Bertindak atas aduan tersebut LT melantik Jawatankuasa Disiplin ('JD') untuk mendengar dan menyiasat aduan tersebut. Kemudian, plaintif/responden ('responden-responden') memfailkan permohonan untuk penghakiman ingkar kehadiran terhadap defendan-defendan. Responden-responden memperoleh Perintah dan menyerahkan deraf perintah kepada JD. Responden-responden menyandar atas Perintah tersebut untuk, antara lain, menghalang JD daripada mendengar dan menyiasat aduan atas alasan bahawa JD akan melanggar Perintah tersebut. JD oleh itu memutuskan untuk tidak meneruskan dengan pendengaran dan siasatan aduan tersebut. Perayu ('Majlis Peguam') memfailkan permohonan melalui saman dalam kamar untuk campur tangan dan mengubah Perintah tersebut. Permohonannya ditolak oleh Mahkamah Tinggi atas alasan bahawa Majlis Peguam gagal menunjukkan bagaimana hak-hak undang-undang dan statutorinya terjejas. Hakim yang bijaksana memutuskan bahawa sepatutnya LT dan bukan Majlis Peguam yang wajar membuat permohonan tersebut. Hakim juga memutuskan bahawa fakta bahawa defendan-defendan tidak mengambil apa-apa langkah untuk mengenepikan Perintah tersebut menunjukkan bahawa mereka tidak mengendahkan pembelaan mereka dan oleh itu adalah menjadi persoalan sama ada mereka benar-benar serius dalam meneruskan aduan mereka. Semasa perbicaraan rayuan, responden-responden menghujah bahawa permohonan defendan-defendan untuk mengenepikan penghakiman di Mahkamah Tinggi telah ditolak dan oleh itu doktrin *res judicata* beraplikasi. Responden-responden juga menghujah bahawa JD tetap dihalang daripada prosiding tersebut kerana tidak ada alasan untuk mereka campur tangan.

Diputuskan, (membenarkan rayuan dengan kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Kecuali bagi tujuan Lembaga Kelayakan Profesion Undang-Undang, satu-satunya badan yang boleh membawa dan membela tindakan undang-undang bagi pihak dan menentang Badan Peguam Malaysia adalah Badan Peguam Malaysia sendiri, yang diwakili oleh Majlis Peguam berikutan ss. 42 dan 47 Akta Profesion Undang-Undang 1976. Terma-terma Badan Peguam Malaysia dan Majlis Peguam digunakan secara saling berganti. Majlis Peguam atau Badan Peguam Malaysia tidak kurang daripada merupakan "pihak terkilan" apabila LT Badan Peguam Malaysia dihalang daripada menjalankan tanggungjawabnya berbanding sesuatu pihak yang dinafikan haknya sendiri. Hakim yang bijaksana terkhilaf apabila beliau membenarkan bentuk mengatasi intipati tanpa memberikan perhatian kepada persoalan sama ada bentuk telah menjejaskan intipati.

(2) Daripada writ saman dan saman dalam kamar, fokus yang jelas dititikberatkan adalah surat aduan oleh defendan-defendan. Adalah jelas daripada keterangan bahawa siasatan oleh JD menjadi fokus pertimbangan apabila deraf Perintah diserahkan kepada JD. Jelas bahawa injunksi tersebut adalah untuk menghalang LT daripada bertindak atas dan JD daripada menyiasat aduan tersebut. Majlis Peguam oleh itu wajar dijadikan pihak. Lebih-lebih lagi apabila satu-satunya pihak yang hadir di hadapan hakim yang bijaksana adalah responden-responden sendiri.

(3) Sikap tidak endah defendan-defendan di dalam prosiding mahkamah atau memilih untuk tidak membela hak undang-undang mereka di mahkamah kemungkinan mewajarkan pertimbangan LT tetapi ia tidak relevan untuk pertimbangan permohonan di hadapan hakim yang bijaksana untuk meminda Perintah tersebut bagi membolehkan LT dan JD menjalankan kewajipan statutorinya untuk menyiasat dan jika perlu, bertindak atas aduan oleh defendan-defendan.

(4) Hujahan responden-responden bahawa tidak ada alasan untuk campur tangan adalah kurang tepat. Terdapat alasan untuk campur tangan dan memohon perubahan Perintah tersebut pada masa permohonan difailkan di Mahkamah Tinggi, untuk

membolehkan Majlis Peguam menjalankan kewajipan statutorinya menyiasat aduan oleh seorang anak guam terhadap tindakan tidak wajar firma guaman.

Case(s) referred to:

Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 41, 42(1)(a), (b), (c), (e), (g), 47, 57(b), (c), 93(1), (2), 103E, 137

For the appellant/intervener - Alvin Julian (V Anil Raj with him); M/s Bodipalar Ponnudurai De Silva

For the respondents/plaintiffs - Mahadzir Nasaruddin; M/s Poh Mahadzir & Co

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: S7-23-132-2008]

Reported by S Barathi

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant, the Majlis Peguam of Malaysia was a proposed intervener in the High Court. Its appeal is against the whole decision of the learned Judicial Commissioner in the High Court of Malaya given on 11 December 2009 dismissing its application made on 16 June 2009 for leave to intervene and to vary an order and a judgment obtained on 22 December 2008 (collectively referred to as "the orders").

Background

[2] On 30 October 2007, Ramasamy a/l Krishnan and Selvarajah a/l Krishnan had written to the Advocates & Solicitors Disciplinary Board ("DB") to lodge a complaint ("the complaint") in respect of one Poh Fook Yuen, the 1st respondent herein, in respect of the latter's actions as an advocate and solicitor practicing at Tetuan Poh Mahadzir & Company, the 2nd respondent, a law firm. Acting upon the complaint, the DB appointed a Disciplinary Committee ("DC") to hear and to investigate the complaint.

[3] On 5 August 2008, the respondents filed as plaintiffs a writ of summons and on 21 October 2008 a summons in chambers to seek a judgment in default of appearance against Ramasamy a/l Krishnan and Selvarajah a/l Krishnan. Pursuant to the writ and the summons in chambers, the respondents obtained the orders on 22 December 2008 as follows:

A: "PERINTAH"

ATAS PERMOHONAN Plaintif-Plaintif yang dinamakan di atas DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 21hb Oktober, 2008 (Lampiran 3) yang disokong oleh Afidavit Sokongan Mahadzir Bin Nasaruddin yang diikrarkan pada 21hb Oktober, 2008 kesemuanya difailkan di sini DAN SETELAH MENDENGAR Encik KC Tang bersama-sama dengan Encik Mahadzir bin Nasaruddin, Peguamcara bagi pihak Plaintif-Plaintif MAKA ADALAH DIPERINTAHKAN seperti berikut:

(1) Bahawa Defendan-Defendan ditahan samada secara diri mereka sendiri, melalui pegawainya, pekerjanya dan/atau ejennya atau yang lain dalam apa jua cara pun daripada melakukan penyiaran, pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif melalui suatu surat Defendan-Defendan bertarikh 30hb Oktober, 2007 kepada Lembaga Tatatertib Peguam-peguam (selepas ini dirujuk sebagai "Surat tersebut");

(2) Selanjutnya atau secara alternatifnya, sekiranya penyiaran dan/atau pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama telah dilakukan oleh Defendan-Defendan ke atas Plaintif-Plaintif, maka Defendan-Defendan dihalang sama ada dengan diri sendiri atau melalui wakilnya, ejennya atau mana-mana satu daripada mereka atau dengan apa jua cara:

(i) dari mengambil apa-apa langkah selanjutnya dan/atau prosiding dalam apa-apa bentuk dan/atau apa cara dalam penyiaran, pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif: dan

(ii) dari menyiarkan dan/atau menyebarkan dan/atau mendedahkan dalam apa-apa cara tentang kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif kepada mana-mana pihak lain;

(3) Gantirugi am ke atas kesengsaraan yang dialami oleh Plaintif-Plaintif setelah penyiaran Surat tersebut yang akan ditaksirkan oleh Mahkamah Yang Mulia ini; dan

(4) Kos permohonan Ini ditanggung oleh Defendan-Defendan.

B: "PENGHAKIMAN"

Tiada kehadiran telah dimasukkan oleh Defendan-Defendan dalam guaman ini DAN ATAS PERMOHONAN Plaintif-Plaintif yang dinamakan di atas DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 21hb Oktober, 2008 (Lampiran 3) yang disokong oleh Afidavit Sokongan Mahadzir Bin Nasaruddin yang diikrarkan pada 21hb Oktober, 2008 kesemuanya difailkan di sini DAN SETELAH MENDENGAR Encik KC Tang bersama-sama dengan Encik Mahadzir bin Nasaruddin peguamcara bagi pihak Plaintif-Plaintif dan Defendan-Defendan tidak hadir walaupun setelah diserahkan dengan sesalinan termeterai Saman Dalam Kamar dan Afidavit Sokongan Mahadzir bin Nasaruddin;

MAKA ADALAH PADA HARI INI DIHAKIMKAN bahawa seperti berikut:

(1) Bahawa Penghakiman Ingkar Pembelaan dimasukkan oleh Plaintif-Plaintif terhadap Defendan-Defendan;

(2) Bahawa Defendan-Defendan ditahan samada secara diri mereka sendiri, melalui pegawainya. Pekerjanya dan/atau ejennya atau yang lain dalam apa jua cara pun daripada melakukan penyiaran, pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif melalui suatu surat Defendan-Defendan bertarikh 30hb Oktober, 2007 kepada Lembaga Tatatertib Peguam-Peguam (selepas ini dirujuk sebagai "Surat tersebut");

(3) Selanjutnya atau secara alternatifnya, sekiranya penyiaran dan/atau pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama telah dilakukan oleh Defendan-Defendan ke atas Plaintif-Plaintif, maka Defendan-

A Defendan dihalang sama ada dengan diri sendiri atau melalui wakilnya, ejennya atau mana-mana satu daripada mereka atau dengan apa jua cara:

(i) dari mengambil apa-apa langkah selanjutnya dan/atau presiding dalam apa-apa bentuk dan/atau apa cara dalam
B penyiaran. pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif; dan

C (ii) dari menyiarkan dan/atau menyebarkan dan/atau mendedahkan dalam apa-apa cara tentang kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif kepada mana-
D mana pihak lain;

(4) Gantirugi am ke atas kesengsaraan yang dialami oleh Plaintif-Plaintif setelah penyiaran Surat tersebut yang akan ditaksirkan oleh Mahkamah Yang Mulia ini; dan

E (5) Kos permohonan ini ditanggung oleh Defendan-Defendan.

[4] Having obtained the orders on 22 December 2008 against Ramasamy a/l Krishnan and Selvarajah a/l Krishnan, the respondents served the draft of the orders on the DC on
F 17 February 2009. The order and judgment as evident from the draft of the orders were relied upon by the respondents to restrain the DC from hearing and investigating the complaint on the grounds that the DC would be in breach of the orders. Concluding that the orders were wide enough to preclude the
G defendants from reiterating their complaints based on their letter dated 30 October 2007, the DC decided on 17 February 2009 not to proceed with the hearing and investigation of the complaint. This is evident from the letter by Darryl SC Goon as Chairman of the Disciplinary Committee. Although the letter is
H dated 27 February 2008, and referred to service of the draft of the orders on 17 February 2008, we are satisfied the year 2008 was an error euphemistically described as typographical error. Nevertheless the lack of due care should not have happened. The year should be 2009, not 2008.

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[5] On 16 June 2009, the Majlis Peguam filed its applications by summons in chambers to intervene and to vary the orders. Its applications were dismissed by the High Court on 11 December 2009.

[6] While accepting the submissions on behalf of the Majlis Peguam as to the tests for intervention, the learned judge held that, on the facts and considering the provisions of the Legal Profession Act 1976, the Majlis Peguam had failed to show how its legal and statutory rights have been affected. The learned judge held that s. 57(b) and (c), s. 42 subs. (1)(a), (b), (c), (e) and (g) of the Legal Profession Act 1976 did not apply in this case. It was held by the learned judge that in light of ss. 93(1) and (2) and 103E, it should be the DB and not the Majlis Peguam who should make the applications. On the facts the learned judge held that Ramasamy a/l Krishnan and Selvarajah a/l Krishnan had not taken any steps to set aside the orders, that they had been lackadaisical in their defence and it begged the question whether they were really serious in pursuing their complaint. On these grounds, the learned judge held he was therefore of the view that the right vests only in the DB and the Majlis Peguam had failed to disclose a legal interest or any statutory provision that conferred a right on the Majlis Peguam to intervene in the proceedings.

[7] On the question of locus, as to whether it is the DB and not the Majlis Peguam who should have made the application to intervene, the starting point is that by virtue of s. 41 of the Legal Profession Act 1976, the legal entity, ie, the body corporate, is the Malaysian Bar.

[8] Next, it is observed that s. 137 of the Act provides:

> 137. Board and Bar to maintain an office
>
> (1) The Board and the Malaysian Bar shall each keep and maintain at all times an office and shall respectively publish in the Gazette the address of that office and any change of such address.
>
> (2) All writs, plaints, notices, pleadings, orders, summonses, warrants or other written communications required or authorised or ordered to be served on or delivered or sent to the Board or the Malaysian Bar shall be deemed to be duly served, delivered or sent if left at the office of the Board or the Malaysian Bar, as the case may be.

[9] It is clear from s. 137(1) therefore that:

(a) While in addition to the Legal Profession Qualifying Board and the Majlis Peguam there are State Bar Committees, Disciplinary Board and various other committees set up under the Act, it is the Majlis Peguam that is created specifically for the proper management of the affairs of the Malaysian Bar as described in the Act, and

(b) The Act recognised two separate entities, ie, the Malaysian Bar and the Legal Profession Qualifying Board.

[10] The fact that, except for the purposes of the Legal Profession Qualifying Board, the Act provides for deeming of service or delivery only to the Malaysian Bar fortifies the view that the only body that may undertake and defend legal action for and against the Malaysian Bar is the Malaysian Bar, represented by the Majlis Peguam pursuant to ss. 42 and 47. In the light of a history of confusion, the terms Malaysian Bar and Majlis Peguam are used interchangeably. The Majlis Peguam or the Malaysian Bar is no less a "party aggrieved" when the DB of the Malaysian Bar is prevented from carrying out its responsibilities than a party who is denied a right he is entitled to. The error the learned judge fell into was to allow form to prevail over substance without first addressing the question whether the form affected substance.

[11] We would further observe that a closer attention to the very brief decision of Nik Hashim FCJ in *Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor* [2008] 4 CLJ 317 would disclose that the germane question to investigate for an objection is not so much the superficial question of the name that is used, but whether it was the DB or the Majlis Peguam itself who actually moved for the application to be commenced under the name of Majlis Peguam.

[12] From the writ of summons of 5 August 2008 and the summons in chambers of 21 October 2008, the apparent focus of concern appears to be the letter of complaint dated 30 October 2007 that had already been written by Ramasamy a/l Krishnan and Selvarajah a/l Krishnan to the DB. It became evident the investigation by the DC was the focus of concern when the drafts of the orders were served on the DC when the latter continued hearing on 17 February 2009. It is clear that the injunction was

to prevent the DB from acting upon and the DC from investigating the complaint. The Majlis Peguam ought therefore to have been made a party.

[13] This is more so when the only party appearing before the learned judge are the respondents themselves. The learned judge fell into error twice. The first in overlooking the twin dangers inherent in a party appearing by and for itself at the hearing of the writ and the summons in chambers for judgment in default of appearance. The second in overlooking the same issue when he rejected the application by Majlis Peguam. That the defendants Ramasamy a/l Krishnan and Selvarajah a/l Krishnan were lackadaisical in the court proceedings or chose not to defend their legal rights in the court may warrant consideration by the DB, but they are irrelevant to the consideration of the application before the learned judge to amend the orders to enable the DB and the DC of the Malaysian Bar to carry out their statutory responsibilities to investigate and if warranted, to act upon a complaint by Ramasamy a/l Krishnan and Selvarajah a/l Krishnan to the DB.

[14] At the hearing of the appeal before us, the 1st respondent, appearing for the respondents, informed this court that there is a recent development, that the application by Ramasamy a/l Krishnan and Selvarajah a/l Krishnan to set aside the judgment in the High Court had been dismissed. It was submitted the doctrine of *res judicata* applied, that the suit was over, there is nothing to intervene and the DC remains restrained from proceeding.

[15] We were much taken up by the last argument. But upon reflection, we realised the argument is misleading. There merely appears to be nothing to intervene in the High Court now. But there was reason to intervene and to seek variation of the orders at the time the application was filed before the High Court, to enable the Majlis Peguam to carry out its statutory obligation to investigate a complaint by a client of a legal firm of improper conduct. That was the time when the learned judge erred. The last part of the submission, that the DB remains restrained, betrays the flaw in the argument there is nothing to intervene in.

[16] For the reasons above, the appeal was allowed with costs, and the decision of the High Court set aside.